No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

NORMA ANDERSON, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States—and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him.

The question presented is:

> Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

PARTIES TO THE PROCEEDING

Petitioner Donald J. Trump was intervenor-appellee/cross-appellant in the state supreme court.

Respondents Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian were petitioners-appellants/cross-appellees in the state supreme court.

Respondent Jena Griswold was respondent-appellee in the state supreme court.

Respondent Colorado Republican State Central Committee was intervenor-appellee in the state supreme court.

A corporate disclosure statement is not required because President Trump is not a corporation. *See* Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Question presented i
Parties to the proceeding ii
Table of contents iii
Table of authorities iv
Opinions below 3
Jurisdiction 3
Constitutional and statutory provisions involved 3
Statement 4
I. The district court proceedings 8
II. The state supreme court proceedings 13
Summary of argument 18
Argument 20
I. The president is not an "officer of the United States" 20
II. President Trump did not "engage in insurrection" 33
III. Section 3 should be enforced only through Congress's chosen methods of enforcement 38
IV. Section 3 cannot be used to deny President Trump access to the ballot 40
V. The Colorado Supreme Court violated the Electors Clause and the Colorado Election Code 46
Conclusion 50

TABLE OF AUTHORITIES

Cases

Anderson v. *Celebrezze*, 460 U.S. 780 (1983) 44
Ashcroft v. Iqbal, 556 U.S. 662 (2009) 36
Brandenburg v. Ohio, 395 U.S. 444 (1969) 37
Bush v. Gore, 531 U.S. 98 (2000) 46, 48
Campbell v. Davidson,
233 F.3d 1229 (10th Cir. 2000) 45
Counterman v. Colorado, 600 U.S. 66 (2023) 38
Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 38
Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) 22
Hassan v. Colorado,
495 F. App'x 947 (10th Cir. 2012) 45
Hernandez v. Mesa, 140 S. Ct. 735 (2020) 32
In re Griffin, 11 F. Cas. 7 (C.C.D. Va. 1869) 3, 16, 39
Martin v. Hunter's Lessee,
14 U.S. (1 Wheat) 304 (1816) 50
Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 19, 40
Moore v. Harper, 600 U.S. 1 (2023) 46, 48
NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 49–50
National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) 30
Russello v. *United States*, 464 U.S. 16 (1983) 30
Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000) 45

Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020) 44
Texas Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006) 44–45
Trump v. Bellows, No. AP-224-01 (Maine Superior Court).....2
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).....1, 19, 41, 43
United States v. Mouat, 124 U.S. 303 (1888) 22
United States v. Smith, 124 U.S. 525 (1888) 22
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).....32
Whitman v. American Trucking Associations, 531 U.S. 457 (2001).....33
Yee v. Escondido, 503 U.S. 519 (1992).....49

Statutes

2 U.S.C. § 5321(c)(1).....29
2 U.S.C. § 5346(b)(1) 29
5 U.S.C. § 13101(12) 29
15 U.S.C. § 9054(5) 29
18 U.S.C. § 2383.....18, 40
28 U.S.C. § 1257.....3, 50
28 U.S.C. § 2383.....33
Act of June 25, 1948, 62 Stat. 869 40
Colo. Rev. Stat. § 1-1-113(1) 5, 8, 46, 48
Colo. Rev. Stat. § 1-1-113(3) 13
Colo. Rev. Stat. § 1-4-1203(2)(a).....14, 15, 47
Colo. Rev. Stat. § 1-4-1204(1)(c).....6
Colo. Rev. Stat. § 1-4-1204(4) 6, 8, 9, 12

The Enforcement Act of 1870, 16 Stat. 140 (1870).....39

Constitutional Provisions

U.S. Const. amend. XII 25
U.S. Const. amend. XXII 25
U.S. Const. amend. XIV, § 3 .....20, 32, 41
U.S. Const. amend. XXV 25
U.S. Const. art. I, § 1, ¶ 2 .....19, 46
U.S. Const. art. I, § 2, ¶ 2 44
U.S. Const. art. I, § 2, ¶ 5 25
U.S. Const. art. I, § 3, ¶ 2 44
U.S. Const. art. I, § 3, ¶ 5 25
U.S. Const. art. I, § 3, ¶ 7 26
U.S. Const. art. I, § 5 29
U.S. Const. art. I, § 6, ¶ 2 26
U.S. Const. art. I, § 9, ¶ 8 26
U.S. Const. art. II ¶ 8.....23
U.S. Const. art. II, § 1, ¶ 2.....26
U.S. Const. art. II, § 1, ¶ 8.....25
U.S. Const. art. II, § 2, cl. 2.....20
U.S. Const. art. II, § 3.....21
U.S. Const. art. II, § 4.....21
U.S. Const. art. VI, § 3.....23
U.S. Const. art. VI, ¶ 3.....26

Other Authorities

William H. Barnes, *History of the Thirty-Ninth Congress of the United States* (1868).....29
William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016) 26

William Baude and Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. ___ (forthcoming 2024) 4, 29, 30
Josh Blackman and Seth Barrett Tillman, *Is President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 NYU J.L. & Liberty 1 (2021).....32
Sophia Bollag, *California lawmaker announces ballot eligibility bill following Colorado ruling on Trump*, San Francisco Chronicle, (Dec. 20, 2023).....2
Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022).....10
Inspector General, Department of Defense, *Review of the DOD's Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and Its Aftermath at the U.S. Capitol Campus on January 6, 2021* (November 16, 2021) 34
Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87 (2021) 39
Matt Markovich, *New legislation could bar Trump from Washington primary ballot*, mynorthwest.com, (Jan. 11, 2024, 10:44 A.M.).....2
Ruling of the Maine Secretary of State (Dec. 28, 2023).....2
Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to Kenneth A. Lazarus, Associate Counsel to the

President, *Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President*, at 2 (Dec. 19, 1974) 23
News Release, State of Colorado Department of State (December 12, 2023) 15
Joseph Story, *Commentaries on the Constitution* ... 22, 24
The Reconstruction Acts, 12 Op. Att'ys Gen. 141 (1867) 27, 35
The Reconstruction Acts, 12 Op. Att'ys Gen. 182 (1867) 28

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BRIEF FOR THE PETITIONER

On December 19, 2023, the Colorado Supreme Court ordered President Donald J. Trump—the leading Republican candidate for president—removed from the presidential primary ballot based on a dubious interpretation of section 3 of the Fourteenth Amendment. Efforts are underway in more than 30 states to remove President Trump from the primary and general-election ballots based on similar rationales. Yet it is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that . . . 'the people should choose whom they please to govern them.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (first quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969); then quoting 2 Elliot's Debates 257 (A. Hamilton, New York)). The Court should put a swift and decisive end to these

ballot-disqualification efforts, which threaten to disenfranchise tens of millions of Americans and which promise to unleash chaos and bedlam if other state courts and state officials follow Colorado's lead and exclude the likely Republican presidential nominee from their ballots.[1]

The Court should reverse the Colorado decision because President Trump is not even subject to section 3, as the President is not an "officer of the United States" under the Constitution. And even if President Trump were subject to section 3 he did not "engage in" anything that qualifies as "insurrection." The Court should reverse on these grounds and end these unconstitutional disqualification efforts once and for all.[2]

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1. *See Ruling of the Maine Secretary of State* (Dec. 28, 2023), http://bit.ly/3O4S8fu; *Trump v. Bellows*, No. AP-224-01 (Maine Superior Court), http://bit.ly/47Hf0IQ.

2. A ruling that reverses the Colorado Supreme Court while remaining agnostic on President Trump's eligibility under section 3 will only delay the ballot-disqualification fight, and there is no shortage of legislators determined to use section 3 as a cudgel to bar President Trump from the general-election ballot or from taking office if this Court leaves any wiggle room for them to do so. *See* Matt Markovich, *New legislation could bar Trump from Washington primary ballot*, mynorthwest.com, (Jan. 11, 2024, 10:44 A.M.), available at http://bit.ly/48QiIRn ("Rep. Kristine Reeves (D-Federal Way) has pre-filed HB 2150, a bill that aims to prevent Trump or any candidate accused of insurrection . . . from being listed on any ballot."); http://bit.ly/3OpYt5B (text of HB 2150); Sophia Bollag, *California lawmaker announces ballot eligibility bill following Colorado ruling on Trump*, San Francisco Chronicle, (Dec. 20, 2023), available at http://bit.ly/48TTrFU ("[A] California lawmaker plans to introduce a bill to make it easier for candidates like Trump to be removed from Golden State ballots.").

There are additional grounds for reversing the Colorado Supreme Court. The state courts should have regarded congressional enforcement legislation as the exclusive means for enforcing section 3, as Chief Justice Chase held in *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (*Griffin's Case*). In addition, section 3 cannot be used to deny President Trump (or anyone else) access to the ballot, as section 3 prohibits individuals only from *holding* office, not from *seeking* or *winning election* to office. Finally, the Colorado Supreme Court's ruling violates the Electors Clause because nothing in Colorado's Election Code allows the state judiciary to order the Secretary of State to remove a candidate from the presidential primary ballot.

OPINIONS BELOW

The state supreme court's opinion is at 2023 WL 8770111, and is reproduced at Pet. App. 1a–183a. The district court's opinion is at 2023 WL 8006216, and is reproduced at Pet. App. 184a–284a.

JURISDICTION

The state supreme court entered judgment on December 19, 2023. Pet. App. 1a. President Trump timely petitioned for certiorari on January 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. 318a–325a.

STATEMENT

Over the last few months, more than 60 lawsuits or administrative challenges have been filed in an effort to keep President Trump from appearing on the presidential primary or general-election ballot. The theory behind these lawsuits and challenges is that President Trump is disqualified from holding office under section 3 of the Fourteenth Amendment because he supposedly "engaged in insurrection" on January 6, 2021.[3] Courts considering these claims have rejected them for varying reasons until the Colorado Supreme Court's ruling of December 19, 2023, which ordered the Colorado Secretary of State to exclude President Trump from the ballot.

The respondents in this case include six individuals eligible to vote in Colorado's Republican presidential primary (the "Anderson litigants").[4] They sued Colorado Secretary of State Jena Griswold in state district court, claiming that section 3 establishes "a constitutional limitation on who can run for President."[5]

The Anderson litigants sued under sections 1-1-113(1) and 1-4-1204(4) of the Colorado Revised Statutes.

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3. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. ___ (forthcoming 2024), available at http://bit.ly/3RCboSp.

4. The Anderson litigants are "petitioners" in the state-court proceeding but respondents in this Court. Secretary Griswold is a respondent in both the state-court proceedings and this Court. To avoid confusion, we will use the parties' names rather than their status as petitioners or respondents.

5. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 343, available at http://bit.ly/3vgwuP2.

Section 1-1-113(1) allows an eligible voter to sue any person "charged with a duty" under the Colorado Election Code, but only if that person "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1) (Pet. App. 319a).[6] And section 1-4-1204(4) specifically authorizes an eligible voter to challenge "the listing of any candidate on the presidential primary election ballot" under the procedures in section 1-1-113, although section 1-4-1204(4) imposes additional rules for these types of lawsuits and demands that they be resolved with extraordinary speed:

> Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for

6. The full text of Colo. Rev. Stat. § 1-1-113(1) provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

> candidates. . . . No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing.

Colo. Rev. Stat. § 1-4-1204(4) (Pet. App. 325a).

Nothing in Colorado's Election Code requires the Secretary of State to evaluate the qualifications of presidential primary candidates. Instead, the Colorado statutes require a presidential primary candidate to submit a "notarized statement of intent." Colo. Rev. Stat. § 1-4-1204(1)(c) (Pet. App. 324a). This statement-of-intent form, which appears on the Secretary of State's website,[7] requires presidential candidates to "affirm" that they meet the Constitution's age, residency, and natural-born citizenship requirements by checking the following boxes:

Qualifications for Office (You must check each box to affirm that you meet all qualifications for this office)

☐ Age of 35 Years ☐ Resident of the United States for at least 14 years ☐ Natural-born U.S. Citizen

The statement-of-intent form also requires candidates to sign an "affirmation" that they "meet all qualifications for the office prescribed by law":

Applicant's Affirmation

I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law.

7. *See* http://bit.ly/41xG63P [http://perma.cc/PE28-ZLD5].

A signature line appears below this affirmation, along with an unfilled notarial certificate. Colorado law imposes no duty on the Secretary of State to verify or second-guess the candidate's sworn representations, or to exclude presidential candidates from the ballot if the Secretary disbelieves or disagrees with the candidate's sworn representations.

The Anderson litigants nonetheless insist that Secretary Griswold has a "mandatory duty" to enforce section 3 of the Fourteenth Amendment regardless of what state law might provide,[8] and they derive this "duty" from the Secretary's oath to support the U.S. Constitution.[9] They also claim that any decision to include Trump on the presidential primary ballot would violate the Constitution and therefore qualify as "a breach or neglect of duty or other wrongful act" within the meaning of section 1-1-113(1).[10] So they sued for relief under section 1-1-113(1),

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8. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 440, available at http://bit.ly/3vgwuP2 ("The Secretary has a mandatory duty to support, obey, consider, apply, and enforce the U.S. Constitution, including Section 3 of the Fourteenth Amendment, in executing her official duties.").

9. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 439, available at http://bit.ly/3vgwuP2 ("Both the Secretary and this Court are required by law to take an oath to support the U.S. Constitution, including Section 3 of the Fourteenth Amendment.").

10. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 442, available at http://bit.ly/3vgwuP2 ("Any action by the Secretary to provide ballot access to a presidential primary candidate who fails to meet all constitutional qualifications for the Office of President is . . . 'a breach or neglect of duty or other wrongful act'" (citing Colo. Rev. Stat. 1-1-113(1)).

which authorizes a state district court to "issue an order requiring substantial compliance with the provisions of" the Colorado Election Code. *See* Colo. Rev. Stat. § 1-1-113(1).[11]

I. THE DISTRICT COURT PROCEEDINGS

The Anderson litigants filed their petition on September 6, 2023. Pet. App. 12a (¶ 14). The district court did not, however, hold a hearing within five days of the filing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties."). Instead, the district court held a status conference on September 18, 2023, after the statutory deadline for the hearing had passed, and it scheduled a five-day hearing to begin on October 30, 2023—54 days after the petition's filing date, exceeding the statutory deadline ten times over.[12]

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11. The Anderson litigants also brought a claim for declaratory relief against both Secretary Griswold and President Trump but dropped this count after President Trump moved to dismiss. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶¶ 449–452, available at http://bit.ly/3vgwuP2; *Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O. President Trump then rejoined the case as an intervenor. *See Anderson v. Griswold*, 2023CV32577, President Donald J. Trump's Unopposed Motion to Intervene, available at http://bit.ly/3tupoFU.

12. Pet. App. 12a–13a; *see also Anderson v. Griswold*, 2023CV32577, Minute Order, http://bit.ly/3S53Qtb.

Then the district court denied the motions to dismiss filed by President Trump and the Colorado Republican State Central Committee, which had intervened in the case.[13] The district court denied President Trump basic discovery tools, including the opportunity to depose experts or potential witnesses, compel production of documents, or receive timely disclosures. Pet. App. 126a. And the district court's improvised yet still-compressed timeframe gave President Trump only 10 days to identify his rebuttal witnesses and 18 days to identify his rebuttal experts.[14]

The district court held a five-day hearing that ran from October 30, 2023, through November 3, 2023. But the district court did not issue findings of fact and conclusions of law within 48 hours of that hearing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4) ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Instead, the district court held closing argument on November 15, 2023—12 days after the conclusion of the hearing—and issued findings of fact and conclusions of law on November 17, 2023. Pet. App. 14a (¶ 22).

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13. Pet. App. 13a–14a; *see also Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O; *Anderson v. Griswold*, 2023CV32577, Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, available at http://bit.ly/3GWQit6.

14. *See Anderson v. Griswold*, 2023CV32577, Minute Order, available at http://bit.ly/3S8vqpq.

The district court's findings of fact rely heavily on the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) ("the January 6th Report"), which the court admitted into evidence over President Trump's hearsay objections.[15] The district court also relied on testimony from Peter Simi, a sociology professor, whom the district court qualified as an expert on political extremism and "the communication styles of far-right political extremists."[16] The district court found that President Trump intended to incite violence on January 6, 2021, by relying on Simi's analysis of President Trump's purported "history with political extremists,"[17] as well as Simi's opinion that President Trump "developed and employed a coded language based in doublespeak that was understood between himself and far-right extremists, while maintaining a claim to ambiguity among a wider audience."[18] The district court wrote:

> As Professor Simi testified, Trump's speech took place in the context of a pattern of Trump's knowing "encouragement and promotion of violence" to develop and deploy a shared coded language with his violent supporters. An understanding had developed between Trump and some of his most extreme supporters that

15. Pet. App. 191a–199a (¶¶ 20–38).
16. Pet. App. 201a (¶ 42).
17. Pet. App. 209a–214a (¶¶ 61–86).
18. Pet. App. 213a–214a (¶ 83).

> his encouragement, for example, to "fight" was not metaphorical, referring to a political "fight," but rather as a literal "call to violence" against those working to ensure the transfer of Presidential power. . . . Trump understood the power that he had over his supporters.

Pet. App. 228a–229a (¶¶ 142–143). Simi relied exclusively on public speeches and the January 6th report to opine on these reactions to President Trump's words; he conducted no research, interviews, or fieldwork of his own. Simi also disclaimed any opinion on President Trump's intent or state of mind.[19] Yet the district court used Simi's testimony to support its factual finding that President Trump intended to incite violence despite Simi's concession that he could not testify to President Trump's intent or state of mind. Pet. App. 228a–229a (¶¶ 142–143).

For its conclusions of law, the district court held that the Colorado Election Code does not allow the Secretary of State to assess a presidential candidate's eligibility under section 3 of the Fourteenth Amendment. Pet. App. 248a (¶ 224) ("[T]he Court agrees with Intervenors that the Secretary cannot investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment"). But it nonetheless held that section 1-4-1204(4) gives *courts* that authority because it requires

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19. *See* Trial Transcript Day 2, 205:19–23, available at http://bit.ly/3S3HTuv ("Q. . . . [D]o you have evidence that it was President Trump's intention to call them to action? A. My, you know, opinion is not addressing that issue. Again, not in President Trump's mind.").

district courts to "hear the challenge and assess the validity of all alleged improprieties" and "issue findings of fact and conclusions of law." Pet. App. 248a (¶ 224). But section 1-4-1204(4) also says that any "challenge to the listing of any candidate on the presidential primary election ballot must be made . . . in accordance with section 1-1-113(1)." Colo. Rev. Stat. § 1-4-1204(4). And section 1-1-113(1) allows relief only when "*a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*"—and it allows only the issuance of orders "requiring substantial compliance with the provisions of this [election] code." Colo. Rev. Stat. § 1-1-113(1) (emphasis added). The district court did not explain how the Anderson litigants could proceed under section 1-1-113 when its opinion admits that Secretary Griswold had done nothing wrong—and when it further acknowledges that the Colorado Election Code *forbids* Secretary Griswold to "investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment." Pet. App. 248a (¶ 224); *see also* Pet. App. 41a (¶ 80) ("[S]ection 1-1-113 . . . proceedings entertain only one type of claim—election officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code.").

The district court went on to hold that President Trump had "engaged in insurrection" within the meaning of section 3. Pet. App. 249a–277a (¶¶ 225–298). But the district court ultimately concluded that section 3 was inapplicable to President Trump because the president is not "an officer of the United States." Pet. App. 282a

(¶ 313) ("[T]he Court is persuaded that 'officers of the United States' did not include the President of the United States."). It also held that the presidency is not an "office . . . under the United States" for purposes of section 3. Pet. App. 278a–279a (¶ 304).

II. THE STATE SUPREME COURT PROCEEDINGS

Both the Anderson litigants and President Trump sought review in the Colorado Supreme Court,[20] which accepted jurisdiction and reversed the district court. Pet. App. 1a–183a.

The Colorado Supreme Court first addressed whether the Anderson litigants could pursue their claims under section 1-1-113, which requires an allegation that Secretary Griswold would "commit a breach or neglect of duty or other wrongful act"[21] by allowing President Trump on the ballot. Like the district court, the state supreme court acknowledged that the Colorado Election Code imposes no "duty" on Secretary Griswold to determine whether presidential primary candidates satisfy the qualifications for office:

> [I]f the contents of a signed and notarized statement of intent appear facially complete . . . the Secretary has no duty to further investi-

20. *See* Colo. Rev. Stat. § 1-1-113(3) ("The proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdiction of the case.").

21. Colo. Rev. Stat. § 1-1-113(1).

> gate the accuracy or validity of the information the prospective candidate has supplied. . . . To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

Pet. App. 32a (¶ 59). Yet the court still held that Secretary Griswold would commit a "wrongful act" within the meaning of section 1-1-113 by allowing a disqualified candidate to appear on a presidential primary ballot. Pet. App. 33a–34a (¶ 62).

The court reached this conclusion by asserting that section 1-4-1203(2)(a) allows only "qualified" candidates to participate in Colorado's presidential primary. Pet. App. 21–22a (¶ 37) ("The Election Code limits participation in the presidential primary to 'qualified' candidates." (citing Colo. Rev. Stat. § 1-4-1203(2)(a)); Pet. App. 33a (¶ 62) ("[C]ertifying an unqualified candidate to the presidential primary ballot constitutes a 'wrongful act' that runs afoul of section 1-4-1203(2)(a)"). But section 1-4-1203(2)(a) says nothing of the sort. It says (in relevant part):

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a) (Pet. App. 321a). This is a restriction only on the *political parties*, not the candi-

dates, that may participate in Colorado's presidential primary—and it requires only that a participating political party have *at least one* "qualified candidate entitled to participate in the presidential primary election pursuant to this section." *Id.* Section 1-4-1203(2)(a) does not say that all of a party's presidential candidates must be "qualified." And it does not require (or even allow) Secretary Griswold or the courts to purge individual candidates from a qualifying party's primary ballot based on their own assessments of a candidate's qualifications. The Colorado Republican Party has at least seven presidential candidates who are "qualified" and "entitled to participate in the presidential primary election."[22] One such candidate is all that is needed to show that the Colorado Republican Party is "entitled to participate" in the presidential primary election under section 1-4-1203(2)(a), and section 1-4-1203(2)(a) has no further role to play.

Having concluded that the Anderson litigants could proceed under section 1-1-113, the state supreme court went on to consider the merits. It rejected President Trump's due-process challenge to the district court's expedited consideration of the section 1-1-113 claims. Pet. App. 41a–45a. It also held that the disqualification imposed by section 3 is self-executing and attaches automatically without any need for congressional enforce-

22. *See* News Release, State of Colorado Department of State (Dec. 12, 2023), available at http://bit.ly/41Ayuxq (reporting that seven Republican presidential candidates, including Ron DeSantis, Nikki Haley, and Vivek Ramaswamy, "have submitted the necessary paperwork and meet the criteria for candidacy").

ment legislation. Pet. App. 45a–55a; *see also* Pet. App. 50a–53a (rejecting the rationale of *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (*Griffin's Case*)). And it rejected President Trump's argument that section 3 presents a non-justiciable political question. Pet. App. 55a–61a.

Finally, the Colorado Supreme Court reversed the district court's conclusions that section 3 is inapplicable to President Trump, holding both that the president is an "officer of the United States," and that the presidency is an "office . . . under the United States." Pet. App. 61a–76a. It also affirmed the district court's findings that President Trump "engaged in insurrection,"[23] and rejected President Trump's First Amendment arguments.[24] The court concluded by holding that "it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot," and it forbade the Secretary to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." Pet. App. 114a (¶ 257). But the court stayed its ruling until January 4, 2024, and announced that the stay would automatically continue if President Trump sought review in this Court. Pet. App. 114a (¶ 257).

Three justices dissented. Chief Justice Boatright argued that section 1-1-113's "expedited procedures" and strict statutory deadlines make it impossible for section 1-1-113 proceedings to accommodate the "uniquely complex questions" that arise when a litigant seeks to dis-

23. Pet. App. 83a–100a.

24. Pet. App. 100a–114a.

qualify a presidential candidate. Pet. App. 115a–124a. Justice Berkenkotter dissented on similar grounds,[25] and she also attacked the majority's false and atextual claim that section 1-4-1203(2)(a) allows only "qualified" candidates to appear on a party's presidential primary ballot. Pet. App. 177a–182a. Finally, Justice Samour would have followed the reasoning of *Griffin's Case* and declared section 3 non-self-executing. Pet. App. 125a–161a. Justice Samour also argued that the district-court proceedings violated due process by denying discovery, rushing the proceedings, and basing factual findings on a hearsay congressional report and experts of dubious reliability. Pet. App. 158a (¶ 342) ("I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom.").[26]

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25. Pet. App. 162a–177a.

26. The federal questions sought to be reviewed were timely and properly raised in the district court and state supreme court. *See* Proposed Findings and Conclusions, at 34–38, http://bit.ly/3vlw9up (meaning of Colorado election statutes); *id.* at 40–58 (section 3 inapplicable to President Trump); *id.* at 58–63 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 63–72 (section 3 non-self-executing); *id.* at 73–83 (political question); *id.* at 101–77 (President Trump didn't "engage in insurrection"); Opening-Answer Br., http://bit.ly/3tz8Ht5 at 5–13 (section 3 inapplicable to President Trump); *id.* at 13–16 (meaning of Colorado election statutes); *id.* at 18–21 (section 3 non-self-executing); *id.* at 21–25 (political question); *id.* at 25–28 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 29–43 (President Trump didn't "engage in insurrection").

SUMMARY OF ARGUMENT

1. The Court should reverse because President Trump is not subject to section 3. The president is not an "officer of the United States" as that term is used in the Constitution. President Trump also never swore an oath before he became president that could trigger the application of section 3.

2. The Court should also reverse because President Trump did not "engage in insurrection." The Colorado Supreme Court tried to impute the conduct of others to President Trump. But the Anderson litigants needed to show that President Trump's own conduct qualified as "insurrection," and they cannot make that showing when President Trump never participated in or directed any of the illegal conduct that occurred at the Capitol on January 6, 2021. In fact, the opposite is true, as President Trump repeatedly called for peace, patriotism, and law and order.

3. The Court should follow the rationale of *Griffin's Case* and Justice Samour's dissent and allow the judiciary to enforce section 3 only through congressional implementing legislation such as 18 U.S.C. § 2383. This Court has on occasion allowed congressionally created remedial schemes to implicitly preclude other means of enforcement. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). And there are reasons to do so here given the precedent of *Griffin's Case*, the antidemocratic nature of section 3, and the danger that courts will apply the "engaged in insurrection" test in a partisan or tendentious manner.

4. The Colorado Supreme Court's ruling violates the holding of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), which prohibits states from prescribing their own qualifications for the presidency or modifying the Constitution's eligibility criteria in any manner. *See id.* at 803–04 ("States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'" (quoting 1 Story § 627)); *id.* at 855 n.6 (Thomas, J., dissenting) ("[T]he people of a single State may not prescribe qualifications for the President of the United States"). The Constitution requires that the President qualify under section 3 only during the time that he *holds* office. Yet the Colorado Supreme Court is demanding that presidential candidates qualify under section 3 at the time of the primary and general elections—and at the time of any state-court ruling that weighs in the candidate's eligibility—even though Congress could remove the section 3 disability before Inauguration Day.

5. The Colorado Supreme Court's ruling violates the Electors Clause, which requires states to appoint their presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. I, § 1, ¶ 2. Nothing in Colorado's Election Code allows the judiciary to order the Secretary of State to remove President Trump from the Republican presidential primary ballot.

ARGUMENT

I. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES"

Section 3's disqualification can apply only to those who have "previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States." U.S. Const. amend. XIV, § 3. It is undisputed that President Trump never took such an oath as a member of Congress, as a state legislator, or as a state executive or judicial officer. Pet. App. 279a (¶ 305). So section 3 cannot apply to President Trump unless the president qualifies as an "officer of the United States" within the meaning of the Constitution.

The Constitution's text and structure make clear that the president is not an "officer of the United States." This phrase "officer of the United States" appears in three constitutional provisions apart from section 3, and each time the president is excluded. The Appointments Clause requires the president to appoint ambassadors, public ministers and consuls, justices of the Supreme Court, and "*all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Commissions Clause similarly requires the President to "Commission *all the Officers of the United States*." U.S. Const. art. II, § 3 (emphasis added). The president does not (and cannot) appoint or commission himself, and he cannot qualify as an "officer of the United States" when the Constitution

draws a clear distinction between the "officers of the United States" and the president who appoints and commissions them.

The Impeachment Clause also shows that the president is not an "officer of the United States." It says:

> The President, Vice President *and all civil Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Const. art. II, § 4 (emphasis added). There is no need to separately list the president and vice president as permissible targets of impeachment if they fall within the phrase "all civil Officers of the United States." And if that phrase encompasses the president and vice president, then the Impeachment Clause would say that the "President, Vice President and all *other* civil Officers of the United States" are subject to impeachment and removal. As Justice Story explained:

> [T]he enumeration of the president and vice president, as impeachable officers, was indispensable. . . . [T]he [impeachment] clause . . . does not even affect to consider them officers of the United States. Other clauses of the constitution would seem to favor the same result; particularly the clause, respecting appointment of officers of the United States by the executive, who is to "commission all the officers of the United States"

See Joseph Story, 2 *Commentaries on the Constitution* § 791.

The precedent of this Court confirms that the president is not an "officer of the United States." In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court correctly observed that the "officers of the United States" include only appointed and not elected officials. *See id.* at 497–98 ("The people do not vote for the 'Officers of the United States.'" (citing U.S. Const. art. II, § 2, cl. 2)). And in *United States v. Mouat*, 124 U.S. 303 (1888), this Court interpreted the phrase "officers of the United States" in a statute and held that it extends only to those appointed by the president, the courts of law, or the heads of department:

> Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. We do not see any reason to review this well established definition of what it is that constitutes such an officer.

Id. at 307; *see also United States v. Smith*, 124 U.S. 525, 532 (1888) ("An officer of the United States can only be appointed by the president, by and with the advice and consent of the senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense

of the constitution."). The Office of Legal Counsel has also opined that "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President." Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to Kenneth A. Lazarus, Associate Counsel to the President, *Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President*, at 2 (Dec. 19, 1974).

Then there is the fact that section 3 applies only to those who took an oath to "support" the Constitution of the United States—the oath required by Article VI. *See* U.S. Const. art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to *support* this Constitution" (emphasis added)). The president swears a different oath set forth in Article II, in which he promises to "preserve, protect, and defend the Constitution of the United States"—and in which the word "support" is nowhere to be found. *See* U.S. Const. art. II ¶ 8.

The Colorado Supreme Court made no attempt to explain how "officers of the United States" can include the president when this phrase excludes the president everywhere else it appears in the Constitution—and it entirely ignored President Trump's arguments that relied on these constitutional provisions. Pet. App. 70a–73a. Instead, the Colorado Supreme Court claimed that "the normal and ordinary usage of the term 'officer of the United States' includes the President." Pet. App. 70a (¶ 145). That is simply false; every time this phrase ap-

pears in the Appointments Clause, the Commissions Clause, and the Impeachment Clause it excludes the President and refers only to appointed and commissioned officers rather than elected officials.[27] The Colorado Supreme Court noted that Federalist No. 69 describes the president as an "officer elected by the people,"[28] and that Andrew Johnson once described himself as "the chief executive officer of the United States" in a proclamation,[29] but none of that has any bearing on whether the president is an "officer of the United States" as that phrase is used in the Constitution. The Colorado Supreme Court also cited a draft law-review article to support its claim that "Section Three's drafters and their contemporaries understood the President as an officer of the United States,"[30] but that article cites nothing that purports to interpret the Constitution's use of this phrase. The Colorado Supreme Court noted that the President is an "officer" in its "ordinary meaning" and claimed that President Trump conceded that the presi-

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27. The Senate's refusal to consider the House of Representatives' impeachment of Senator William Blount in 1799 confirms that Senators and Representatives, like the President and Vice-President, are not "civil officers of the United States" within the meaning of the Impeachment Clause. *See* Joseph Story, 2 *Commentaries on the Constitution* § 791.

28. Pet. App. 70a (¶ 145) (citing The Federalist No. 69 (Hamilton)).

29. Pet. App. 70a (¶ 145) (citing John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) (manuscript at 17–18)).

30. Pet. App. 70a (¶ 146) (citing Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers* at 18–19, available at http://bit.ly/3Hi46P4).

dent is an "officer" in the colloquial sense,[31] but the Constitution makes clear that one can be an "officer" without being an "officer of the United States." Article I requires the House and Senate to choose their "officers,"[32] but these legislative officers are not "officers of the United States" because they are not appointed or commissioned by the President, nor are they subject to impeachment.[33]

The same goes for the Colorado Supreme Court's claim that the presidency qualifies as an "office . . . under the United States." Pet. App. 70a (¶ 145); *id.* at 62a–70a. The presidency is obviously an "office,"[34] and whether the phrase "office . . . under the United States" includes the presidency is far from clear in the Constitution.[35] *See*

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31. Pet. App. 71a (¶ 148).

32. *See* U.S. Const. art. I, § 2, ¶ 5 ("The House of Representatives shall chuse their Speaker and other Officers"); U.S. Const. art. I, § 3, ¶ 5 ("The Senate shall chuse their other Officers").

33. *See* note 27 *supra*.

34. *See* U.S. Const. art. I, § 3, ¶ 5 (referring to "the *Office* of President" (emphasis added)); U.S. Const. art. II, § 1, ¶ 5 (same); U.S. Const. art. II, § 1, ¶ 8 ("Before he enter on the Execution of his *Office*, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the *Office* of President of the United States . . .'" (emphasis added); U.S. Const. amend. XII ("[N]o person constitutionally ineligible to the *office* of President shall be eligible to that of Vice-President of the United States." (emphasis added)); U.S. Const. amend. XXII ("No person shall be elected to the *office* of the President more than twice" (emphasis added)); U.S. Const. amend. XXV ("In case of the removal of the President from *office* . . . , the Vice President shall become President." (emphasis added)).

35. *See* U.S. Const. art. I, § 3, ¶ 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and

(continued…)

Amicus Br. of Professor Kurt T. Lash (concluding that "officer . . . under the United States" is "ambiguous" on whether it includes the presidency, but that history and usage shows that it does not); William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), http://bit.ly/3O7U7zw (noting historical examples suggesting that the presidency is not an "office . . . under the United States"). But occupying an "office"—even an "office . . . under the United States"—does not make one an "officer of the United States" as that term is used in the Constitution. The Constitution refers to many "officers" and "offices," including the "officers" of the House and Senate[36] and the "offices" of the President and Vice President.[37] But none of the individuals who hold those "offices" are encompassed within the phrase "officers of the United States" because they are not appointed pursuant to Article II or commissioned by the President, and they are not subject to impeachment as

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disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"); U.S. Const. art. I, § 6, ¶ 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); U.S. Const. art. I, § 9, ¶ 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); U.S. Const. art. II, § 1, ¶ 2 ("[N]o Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); U.S. Const. art. VI, ¶ 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

36. *See supra* note 32.

37. *See supra* note 34.

"civil officers of the United States."[38] The Colorado Supreme Court had no answer to this.

The state supreme court also invoked two statements from Attorney General Homer Stanbery. Pet. App. 71a–72a (¶ 149). The first observed that the phrase "'officer of the United States,' within [section 3] . . . is used in its most general sense, and without any qualification, as legislative, or executive, or judicial." *The Reconstruction Acts*, 12 Op. Att'ys Gen. 141, 158 (1867) ("*Stanbery I*"). But Stanbery made this statement only to draw a contrast with the provision in section 3 that disqualifies individuals who had previously taken an oath "as an *executive or judicial* officer of any State." *See id.* at 152–58 (analyzing the scope of "executive or judicial officers of a State"). Stanbery did not claim that the president is included within the meaning of "officers of the United States," and his statement offers no support for that idea.

The second statement asserts that: "The person who has at any time prior to the rebellion *held any office, civil or military, under the United States*, and has taken an official oath to support the Constitution of the United States, is subject to disqualification." *The Reconstruction Acts*, 12 Op. Att'ys Gen. 182, 203 (1867) ("*Stanbery II*") (emphasis added). But that is not what section 3 says. Disqualification turns on whether a person engaged in rebellion after taking an oath "as a member of Congress, or as an officer of the United States." It does not turn on whether the person "held any *office*, civil or

38. *See supra* note 27.

military, *under the United States*." *Id.* (emphasis added). Many officeholders—such as the President, Vice President, and the "officers" of the House and Senate—are not "officers of the United States" because they are not appointed pursuant to Article II or commissioned by the President, and because they are not subject to impeachment as "civil officers of the United States." Stanbery's *ipse dixit*, unsupported by any analysis, cannot overcome the fact that the Constitution requires "officers of the United States" to be appointed pursuant to Article II and commissioned by the president. There is no way to squeeze the president into this category.

The Colorado Supreme Court also claimed that each listed category of positions previously held by disqualified individuals should produce an exact match with a listed category of positions that they are ineligible to hold—and it insisted that "officers of the United States" must be therefore construed as coterminous with anyone who holds an "office . . . under the United States":

> There is a parallel structure between the two halves: "Senator or Representative in Congress" (protected office) corresponds to "member of Congress" (barred party); "any office . . . under the United States" (protected office) corresponds to "officer of the United States" (barred party); and "any office . . . under any State" (protected office) also has a corresponding barred party in "member of any State legislature, or as an executive or judicial officer of any State."

Pet. App. 72a (¶ 150); *see also id.* (citing Baude & Paulsen, *supra* at 106). This is wrong for many reasons. First, "member of Congress" extends more broadly than "Senator or Representative in Congress," as the former category includes nonvoting delegates or resident commissioners who do not qualify as "Senators" or "Representatives."[39] The 39th Congress, which approved the Fourteenth Amendment and sent it to the states for ratification, had nine of these non-voting delegates from territories that had not yet been admitted as states.[40] So the Colorado Supreme Court's demand for equivalence and perfect correspondence between the categories of "offices . . . under the United States" and "officers of the United States" is baseless, and it has no reason for demanding the symmetry envisioned by Professors Baude and

39. *See* 2 U.S.C. § 5321(c)(1) ("[T]he term 'Member of the House of Representatives' means a Representative in, or a Delegate or Resident Commissioner to, the Congress"); 2 U.S.C. § 5346(b)(1) (same); 5 U.S.C. § 13101(12) ("The term 'Member of Congress' means a United States Senator, a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico."); 15 U.S.C. § 9054(5) (same); 3 Stat. 363 (1817) (granting territories the right to elect nonvoting delegates who "shall have a seat" in the House of Representatives "with a right of debating"). In 1869, the House of Representatives censured non-voting delegate Edward D. Holbrook from the territory of Idaho for "unparliamentary language," consistent with its constitutional prerogative to "punish its *Members* for disorderly Behavior." U.S. Const. art. I, § 5 (emphasis added); *see also* http://bit.ly/4b47k6G.

40. *See* William H. Barnes, *History of the Thirty-Ninth Congress of the United States* 577–624 (1868).

Paulsen when the text of section 3 rejects the very idea that they propose.[41]

Second, as the Colorado Supreme Court points out, section 3 prohibits disqualified individuals from serving in the Electoral College, yet it does not disqualify former electors who engaged in insurrection. Pet. App. 72a. So there is (once again) no basis for insisting on correspondence between listed categories of disqualified officeholders and the listed categories of offices for which they are disqualified—or for insisting that every person who occupies an "office . . . under the United States" must therefore be an "officer of the United States."

Third, the canons of construction counsel against giving equivalent meanings to differently phrased provisions. *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (refusing to conclude that "the differing language" in two statutory provisions "has the same meaning in each"). The drafters of the Fourteenth Amendment could have used identical phraseology when describing the "offices" closed to disqualified individuals and the "officers" subjected to disqualification. They could have done so by stating that "No person shall be

41. Baude and Paulsen falsely claim that the distinction between "member" and "Senator or Representative" is a "seemingly purely stylistic variation." *See* Baude & Paulsen, discussed at p. 4, *supra* note 3, at 107.

. . . an officer of the United States" if they engaged in insurrection after swearing an oath as such an officer. Or they could have done so by disqualifying those who engaged in insurrection after swearing an oath "as one holding any office, civil or military, under the United States." That the drafters chose to use different terminology when describing these categories of "offices" and "officers"—and that they did so while using a phrase that clearly excludes the president everywhere else it appears in the Constitution—shows that it is not only permissible but entirely appropriate to exclude the president as an "officer of the United States," even if one simultaneously includes the presidency as an "office . . . under the United States."

The Colorado Supreme Court's final reason for including the president as an "officer of the United States" was based on an appeal to what it claimed to be "the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country." Pet. App. 73a. The court wrote:

> A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose.

Id. None of these statements are true. To begin, none of the former presidents living at the time of Fourteenth Amendment's ratification had supported the confedera-

cy,[42] so excluding the president from the category of "officers of the United States" does nothing to undermine the court-described "purpose" of section 3. The court's description of section 3's "purpose" is also false. Section 3 does not "ensure that disloyal officers could never again play a role in governing the country" because it allows Congress to lift an officer's disqualification by a two-thirds vote in each house. And section 3 does not ban *all* "disloyal officers" from governing the country, but only those who previously swore an oath to support the Constitution "as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. amend. XIV, § 3; *see also West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of . . . purpose is the [enacted] text."). The Court must give effect to the enacted language rather than ruminate about the overarching "purpose" or objectives of those who drafted it. *See Hernandez v. Mesa*, 140 S. Ct. 735, 741–42 (2020) ("No law pursues its purposes at all costs." (citation and internal quotation marks omitted)). And the enacted language excludes the president as an "officer of the United States."

When section 3 lists the officials and positions to which it applies, it does not mention the president or the

42. *See* Josh Blackman and Seth Barrett Tillman, *Is President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 NYU J.L. & Liberty 1, 46 (2021) (noting that John Tyler, the only former president who had supported the confederacy, had died in 1862, before the Fourteenth Amendment was even proposed).

presidency at any point. It also lists the covered officials and positions in descending order, beginning with the highest federal officials and positions and ending with catch-all phrases such as "executive or judicial officer of any State" and "any office, civil or military, under the United States, or under any State." To accept the Colorado Supreme Court's assertion that section 3 includes the presidency, one must conclude that the drafters decided to bury the most visible and prominent national office in a catch-all term that includes low-ranking military officers, while choosing to explicitly mention presidential electors. This reading defies common sense. Congress "does not, one might say, hide elephants in mouseholes."[43] Neither did those who drafted and ratified the Fourteenth Amendment.

II. PRESIDENT TRUMP DID NOT "ENGAGE IN INSURRECTION"

The Court should also reverse because nothing that President Trump did in response to the 2020 election or on January 6, 2021, even remotely qualifies as "insurrection." No prosecutor has attempted to charge President Trump with insurrection under 28 U.S.C. § 2383 in the three years since January 6, 2021, despite the relentless and ongoing investigations of President Trump. And for good reason: President Trump's words that day called for peaceful and patriotic protest and respect for law and order.

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43. *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).

In his speech at the Ellipse, President Trump told the crowd to "peacefully and patriotically make your voices heard." Pet. App. 292a. And he encouraged "support [for] our Capitol Police and Law Enforcement."[44] On the evening of January 5, 2021, President Trump instructed the Secretary of Defense, who had authority to deploy the National Guard, to "do what's required to protect the American people."[45] President Trump never told his supporters to enter the Capitol, and he did not lead, direct, or encourage any of the unlawful acts that occurred at the Capitol—either in his speech at the Ellipse[46] or in any of his statements or communications before or during the events of January 6, 2021. President Trump also sent tweets throughout the day instructing his supporters to "remain peaceful" and "[s]tay peaceful,"[47] and he released a video telling the crowd "to go home now."[48] The Colorado Supreme Court faulted President Trump for (in its view) failing to respond with alacrity when he learned that the Capitol had been breached,[49] but even if

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44. *See* @realDonaldTrump, Twitter (Jan. 6, 2021, 2:38 P.M.), http://bit.ly/3H6t7g8.
45. Inspector General, Department of Defense, *Review of the DOD's Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and Its Aftermath at the U.S. Capitol Campus on January 6, 2021* at 16 (November 16, 2021), http://bit.ly/47HL1k0.
46. Pet. App. 285a–317a (transcript of President Trump's speech at the Ellipse on January 6, 2021).
47. Pet. App. 98a (¶ 217).
48. Pet. App. 99a (¶ 219).
49. Pet. App. 98a–99a (¶ 218).

that were true (and it isn't), a mere failure to act would not constitute "engagement" in insurrection, as even the Colorado Supreme Court recognized. Pet. App. 91a (¶ 195) ("The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." (quoting The Reconstruction Acts, 12 Op. Att'ys Gen. 141, 161 (1867))). Calling for peace, patriotism, respect for law and order, and directing the Secretary of Defense to do what needs to be done to protect the American people is in no way inciting or participating in an "insurrection."

The Colorado Supreme Court held that the events of January 6, 2021, constituted an "insurrection" because: (1) "a large group of people forcibly entered the Capitol"; (2) "the mob was armed with a wide array of weapons"; (3) "the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons"; (4) "the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol"; and (5) "[the mob . . . marched through the [Capitol] building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." Pet. App. 87a–88a. But President Trump did not "engage in" any of those activities. And none of President Trump's actions that the Colorado Supreme Court described come anywhere close to "insurrection." Raising concerns about the integrity of the recent federal election and pointing to reports of fraud and irregularity is not an act of violence or a threat of force. Pet. App. 92a (¶¶ 197–198). And giving a passionate political speech and telling supporters to metaphorically "fight like hell"

for their beliefs is not insurrection either. Pet. App. 97a. Section 3 is not a vicarious-liability regime, and there is no legal basis for imputing the conduct of others to President Trump. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct."). The Anderson litigants must show that President Trump's own conduct—and not the conduct of anyone at the Capitol on January 6th—qualifies as "insurrection." And this they cannot do.

The Anderson litigants insist that President Trump's speech at the Ellipse and his statements and tweets leading up to the events of January 6, 2021, should be regarded as acts of "insurrection" because Professor Simi opined that President Trump was speaking in "coded" language to his supporters. *See* Br. in Response at 28–29. Both the district court and the state supreme court relied heavily on Simi's "coded language" testimony in concluding that President Trump's speeches and statements qualify as "insurrection." Pet. App. 112a–113a; *id.* at 201a; *id.* at 209a–214a; *id.* at 228a; *id.* at 234a; *id.* at 239a. But this Court should not allow a candidate's eligibility for the presidency to be determined or in any way affected by testimony from a sociology professor who claims an ability to decipher "coded" messages. The fact remains President Trump did not commit or participate in the unlawful acts that occurred at the Capitol, and this Court cannot tolerate a regime that allows a candidate's eligibility for office to hinge on a trial court's assessment of dubious expert-witness testimony or claims that President Trump has powers of telepathy.

Finally, President Trump's speech at the Ellipse and his post-election tweets and statements do not remotely constitute "incitement" under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). President Trump's statements cannot be punished under *Brandenburg* unless they were "directed to inciting or producing imminent lawless action" *and* "likely to incite or produce such action." *Id.* at 447. The *Brandenburg* standard does not turn on whether violence actually occurs in response to a person's speech. It only matters whether the speech itself was "intended" and "likely" to incite imminent violence, and the constitutional status of President Trump's statements would be no different if he had given the same speech and his supporters remained entirely peaceful as he urged. This Court would never tolerate criminal prosecution of a speaker who tells his audience to "fight like hell" and "take back our country,"[50] as language and rhetoric of this sort is common in political discourse.[51] Because President Trump did not "incite violence" under *Brandenburg*, it follows *per se* that he did not "engage in insurrection" either.

Nor can Professor Simi's code-breaking abilities transform core political speech into proscribable speech

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50. Pet. App. 229a (¶ 144) ("The Court finds that Trump's Ellipse speech incited imminent lawless violence. Trump did so explicitly by telling the crowd repeatedly to 'fight' and to 'fight like hell,' to 'walk down to the Capitol,' and that they needed to 'take back our country' through 'strength.'").

51. Pet. App. 276a (¶ 297) (acknowledging that "Democratic lawmakers and leaders using similarly strong, martial language, such as calling on supporters to 'fight' and 'fight like hell.'").

based on the identity or the intent of the speaker. *See Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468–69, 492–95 (2007) ("A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."). The words uttered by President Trump on January 6, 2021, would be regarded as entirely benign had they come from any other person, yet the Anderson litigants want the courts to establish a Trump-specific version of the First Amendment because a sociology professor opined that he speaks in "coded" language to his supporters. Pet. App. 276a (¶ 297). But intent becomes relevant under the First Amendment only as a *shield* for speakers who are accused of constitutionally unprotected utterances, and who can defeat those accusations by showing that the allegedly unprotected statements were made without nefarious motives. An inquiry into a speaker's intent can never be used to transform what would ordinarily be constitutionally protected speech into the "unprotected" category. *See Counterman v. Colorado*, 600 U.S. 66, 75 (2023) ("*[T]he added element* reduces the prospect of chilling fully protected expression" (emphasis added)).

III. SECTION 3 SHOULD BE ENFORCED ONLY THROUGH CONGRESS'S CHOSEN METHODS OF ENFORCEMENT

The text of section 3 does not confer enforcement authority on state courts or state officials, and it does not specify a process for determining whether an individual has "engaged in insurrection" and disqualified himself

from holding an enumerated office. Instead, the Fourteenth Amendment empowers Congress to "enforce" section 3 with "appropriate legislation." U.S. Const. amend. XIV. In *Griffin's Case*, Chief Justice Chase held that congressional implementing legislation is the *only* way that section 3 may be enforced, and that state and federal courts are powerless to enforce section 3 absent congressional enforcement legislation under section 5. *See In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869); Pet. App. 125a–161a (Samour, J., dissenting).

In response to *Griffin's Case*, Congress enacted enforcement legislation that required federal prosecutors to bring writs of quo warranto against disqualified office holders, and that imposed criminal penalties on anyone who held or attempted to hold office in violation of section 3. *See* The Enforcement Act of 1870, §§ 14–15, 16 Stat. 140, 143–144 (1870). *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 88–89 (2021) (noting that federal prosecutors brought "many" quo warranto actions to oust ineligible officials under this statute, "including half of the Tennessee Supreme Court"). The Insurrection Act also provides that any person convicted of engaging in "any rebellion or insurrection against the authority of the United States or the laws thereof" shall be "incapable of holding any office under the United States." 18 U.S.C. § 2383. Congress has since repealed the quo warranto provisions from the 1870 enforcement acts,[52] but

52. *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993 (1948).

the Insurrection Act and its disqualification provision remain.

There are compelling reasons to follow the approach of *Griffin's Case* and regard the extant congressional enforcement legislation as the exclusive means of enforcing section 3, especially in light of the antidemocratic nature of section 3 and the vagueness of the "engaged in insurrection" standard. *Cf. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (congressional remedial schemes can implicitly preclude other remedies). Congress legislated against the background of *Griffin's Case* when it enacted and repealed the quo warranto provisions, while preserving the disqualification provision in 18 U.S.C. § 2383. And the proceedings in this case demonstrate the pathologies of allowing the state judiciaries to wade into questions of candidate eligibility under section 3, which are always politically charged and inevitably affected by a court's opinion of the candidate. A presidential candidate's eligibility for office should not be resolved by having a state trial court evaluate opinion testimony from a sociology professor and copy factual findings from a hearsay-filled and partisan congressional committee report, and then demand that reviewing courts defer to its factual findings.

IV. SECTION 3 CANNOT BE USED TO DENY PRESIDENT TRUMP ACCESS TO THE BALLOT

The Court should also reverse because section 3 cannot be used to deny President Trump (or anyone else) access to ballot—regardless of whether a candidate "engaged in insurrection" within the meaning of section 3—

and any effort by the states to convert section 3 into a ballot-access restriction violates the holding of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–04 (1995), which prohibits states from prescribing their own qualifications for the presidency or modifying the Constitution's eligibility criteria in any manner.

Section 3 prohibits individuals only from *holding* office:

> No person shall *be* a Senator or Representative in Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States . . .

U.S. Const. amend. XIV, § 3 (emphasis added). It does not prevent anyone from *running* for office, or from *being elected* to office, because Congress can remove a section 3 disqualification after a candidate is elected but before his term begins. *See id.* ("But Congress may by a vote of two-thirds of each House, remove such disability."). And Congress has done so on many occasions.[53] The existence of this disability-removal provision shows that it is ultimately for Congress to decide whether section 3 should prevent someone from holding office, and a

53. *See* Cong. Globe, 40th Cong., 2d. Sess., 4499 (July 25, 1868); Cong. Globe, 40th Cong., 3d. Sess., 13–14 (Dec. 7, 1868); Cong. Globe, 40th Cong., 3d. Sess., 120–121 (Dec. 17, 1868); *see also id.* (statement of Senator Sawyer) ("It is necessary that the disabilities should be removed from these persons before the recess, in order to enable them to qualify for offices to which they have been elected before the 1st of January. . . . [T]hey are men who were selected by the votes of their several localities to fill important local offices.").

state cannot usurp this congressional prerogative by denying candidates access to the ballot under the guise of "enforcing" section 3.

The Colorado Supreme Court did not go so far as to hold that section 3 bans President Trump from appearing on the ballot as a matter of federal constitutional law, although there is some language in its opinion that gestures toward that idea.[54] Instead, it held that section 1-4-1203(2)(a)—a provision of its state election code—allows only "qualified" candidates to appear on the presidential primary ballot, and that those candidates must be qualified to hold office *before* their name is added to the ballot.[55] This construction of section 1-4-1203(2)(a) violates the U.S. Constitution, as interpreted by all nine justices in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), because it adds a new qualification for the presidency not present in the text of the Constitution.

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54. Pet. App. 36a (¶ 67) ("Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for* or *being elected to* office because Section Three bars individuals only from *holding* office." (emphasis in original)); Pet. App. 20a–21a (¶ 36) ("Part 12 of article 4 of the Election Code . . . explains that 'it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections.' This reference indicates that the legislature envisioned part 12 as operating in harmony with federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.").

55. *See supra* at 14–16; *see also* Pet. App. 21–22a (¶ 37); Pet. App. 33a (¶ 62); Pet. App. 34a (¶ 63); Pet. App. 35a (¶ 64); Pet. App. 36a (¶ 67).

Term Limits renders the states powerless to add to or alter the Constitution's qualifications or eligibility criteria for federal officials, and states are equally powerless to exclude federal candidates from the ballot based on state-created qualifications or eligibility criteria not mandated by the Constitution. *See id.* at 799 ("'It is not competent for any State to add to or in any manner change the qualifications for a Federal office, as prescribed by the Constitution or laws of the United States'" (quoting G. McCrary, American Law of Elections § 322 (4th ed. 1897))); *id.* at 803–04 ("States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'" (quoting 1 Story § 627)); *id.* at 828–36 (rejecting state's attempt to deny ballot access to incumbent congressional candidates who had exceeded an allotted number of terms). Even the *Term Limits* dissenters acknowledged that states are forbidden to prescribe qualifications for the presidency beyond those specified in the Constitution. *See id.* at 855 n.6 (Thomas, J., dissenting) ("[T]he people of a single State may not prescribe qualifications for the President of the United States"); *id.* at 861 (Thomas, J., dissenting) ("[A] State has no reserved power to establish qualifications for the office of President"); *id.* at 861 (Thomas, J., dissenting) ("[T]he individual States have no 'reserved' power to set qualifications for the office of President"). And for good

reason: The president, unlike members of Congress, represents and is elected by the entire nation,[56] and allowing each of the 50 states and the District of Columbia to prescribe and enforce their own qualifications for a nationwide office would be a recipe for bedlam. *See Anderson* v. *Celebrezze*, 460 U.S. 780, 794–95 (1983) ("[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.").

The Colorado Supreme Court's ruling violates *Term Limits* by prescribing a new qualification for the presidency. It requires that a president be "qualified" under section 3 not only on the dates that he holds office, but also on the dates of the primary and general elections—and on whatever date a court renders judgment on his eligibility for the ballot. This is no different from a state's enforcing a pre-election residency requirement for congressional or senatorial candidates, when the Constitution requires only that representatives and senators inhabit the state "when elected." *See* U.S. Const. art. I, § 2, ¶ 2 ("No Person shall be a Representative . . . who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen" (emphasis added)); U.S. Const. art. I, § 3, ¶ 2 (same rule for senators); *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582,

56. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020) ("Only the President (along with the Vice President) is elected by the entire Nation.").

589–90 (5th Cir. 2006) (holding pre-election residency requirements unconstitutional under *Term Limits*); *Campbell v. Davidson*, 233 F.3d 1229, 1233–36 (10th Cir. 2000) (same); *Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000) (same). In each of these situations, a state violates *Term Limits* by altering the timing of a constitutionally required qualification for office.

The Colorado Supreme Court claimed that it has no less authority to exclude President Trump from the ballot than it would a 28 year old or a foreign national. Pet. App. 36a–37a (¶ 68); *see also Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's decision to exclude a naturalized U.S. citizen from the presidential ballot). That is wrong. Congress has *no* authority to lift the Constitution's age, residency, or natural-born citizenship requirements, so any candidate who is currently ineligible under one or more of those criteria will remain ineligible on inauguration day and throughout the duration of the four-year presidential term.[57] But a state cannot assume that a candidate that it believes to be disqualified under section 3 will remain disqualified on the dates that he would actually hold the

57. The only exception is for presidential candidates who will turn 35 (or hit the 14-year residency requirement) after the election but before the expiration of the four-year presidential term. *Term Limits* would prohibit a state from excluding those candidates from the ballot, as the Twentieth Amendment allows voters to elect a president who will become age-eligible (or residency-eligible) during the four-year term and have his vice president take the reins until that happens. *See* U.S. Const. amend. XX, § 3.

office of president. The Court should reverse on this ground and put an end to these unconstitutional efforts to convert section 3 into a ballot-access restriction.

V. THE COLORADO SUPREME COURT VIOLATED THE ELECTORS CLAUSE AND THE COLORADO ELECTION CODE

The Court should reverse for the additional reason that the Colorado Supreme Court violated the Electors Clause, which requires states to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. I, § 1, ¶ 2; *see also Moore v. Harper*, 600 U.S. 1, 36 (2023) ("[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."); *Bush v. Gore*, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

The Colorado legislature allows the state judiciary to intervene in ballot disputes only when a person "charged with a duty" under the Colorado Election Code "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1). Secretary Griswold will not breach or neglect any "duty" or commit a "wrongful act" under the Fourteenth Amendment by listing President Trump on the ballot, because section 3 merely bars individuals from *holding* office, not from seeking or winning election to office. *See supra* at Section IV.

So the Colorado Supreme Court tried to concoct a "wrongful act" by claiming that Secretary Griswold would violate section 1-4-1203(2)(a)—a provision of *state*

election law—by certifying President Trump to the ballot. But section 1-4-1203(2)(a) limits only the *political parties* that may participate in Colorado's presidential primary election, and requires only that participating political parties have at least one "qualified candidate":

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a). The Colorado Supreme Court somehow managed to transform this statutory language into a requirement that *every* candidate that appears on a presidential primary ballot be "qualified"—and it falsely claimed that Secretary Griswold would violate section 1-4-1203(2)(a) if she failed to remove disqualified presidential candidates from the Republican primary ballot. That is not even remotely what the statute says, and the Court should reverse on this ground. Pet. App. 177a–182a (Berkenkotter, J., dissenting). When state courts interpret an election statute according to what they would like for it to say rather than what it actually says, they violate the Electors Clause by "arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36; *see also Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (state court violated the Electors Clause when its interpretations of state election statutes

"impermissibly distorted them beyond what a fair reading required.").[58]

The Anderson litigants are wrong to say that President Trump "forfeited" this Electors Clause claim by failing to raise it in his state supreme court briefing. *See* Br. in Response at 17–18. The state district court's ruling did not adopt the interpretation of section 1-4-1203(2)(a) that appears in the state supreme court's opinion, and it explicitly rejected the idea that section 1-4-1203(2)(a) requires or even allows the Secretary of State to exclude President Trump from the ballot. Pet. App. 245a–246a (¶¶ 215–217).[59] So this Electors Clause claim did not exist when President Trump filed his brief with the state supreme court, and neither President Trump nor his law-

58. The Anderson litigants falsely claim that President Trump's interpretation of section 1-4-1203(2)(a) would "require the Secretary of State to place 16-year-olds and foreign-born citizens on a party's primary ballot when the party fields at least one qualified candidate." Br. in Response at 20–21. President Trump's claim is only that the Colorado Election Code *does not compel* the Secretary of State to remove ineligible candidates from the presidential primary ballot of a party that has at least one qualified candidate — not that it *prohibits* the Secretary from doing so. And absent a provision requiring the Secretary to purge ineligible candidates from the presidential primary ballot, the state judiciary cannot provide a remedy under section 1-1-113(1), which allows relief only when an election official "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1).

59. The state district court instead based its ruling on section 1-4-1204(4) of the Colorado Election Code, claiming that this statute empowered the judiciary to order disqualified candidates removed from the presidential primary ballot. Pet. App. 248a (¶ 224).

yers have powers of divination that would have enabled them to foresee how the state supreme court would interpret section 1-4-1203(2)(a) in its eventual ruling. President Trump also insisted throughout the state-court proceedings that the judiciary has no authority under state law to order Secretary Griswold to remove President Trump from the ballot,[60] and a litigant need not frame his state-law arguments as an Electors Clause claim until a court actually interprets the relevant election statute in a manner that departs from the directions of the legislature. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("[P]arties are not limited to the precise arguments they made below.").

Yet even apart from the Electors Clause, there is nothing wrong with a ruling from this Court that rejects the Colorado Supreme Court's interpretation of state election law on state-law grounds. There is no federal statute or constitutional provision that bans this Court from reviewing state-law questions under 28 U.S.C. § 1257,[61] or that prohibits this Court from rejecting a state supreme court's construction of state law. This Court has been understandably deferential to state-court interpretations of state law, but that deference has never been absolute, especially when a state-law issue is intertwined with a federal constitutional question. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–

60. *See* Opening-Answer Br., http://bit.ly/3tz8Ht5 at 13–16.

61. 28 U.S.C. § 1257 (allowing this Court to review the entirety of a "final judgment[] or decree[] rendered by the highest court of a state").

58 (1958); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 358 (1816). The law of Colorado is what its statutes say, and opinions from the judiciary that interpret those statutes need not be followed if they flout the enacted language and disrupt federal interests of enormous importance.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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